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No. 672

In the

Supreme Court of the United States

OCTOBER TERM, 1958

AURELIO ZACARIAS,

v.

UNITED STATES OF AMERICA

PETITION OF AURELIO ZACARIAS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To The Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Aurelio Zacarias respectfully petitions that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit which dismissed your petitioner's appeal from an order and judgment of the United States District Court for the Western District of Texas, El Paso Division, denying petitioner's motion to suppress evidence.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet recorded. It is set out in the transcript of the record in that Court. (R. 92.)

JURISDICTION

The judgment of the Court of Appeals was made and entered on December 2, 1958. Petitioner duly and timely filed his petition for rehearing on December 18, 1958. (R. 97.) The Court of Appeals made and entered its order denying the same on January 5, 1959. (R. 100.)

The jurisdiction of this Court is invoked under *28 U. S. C. A., §1254(1)* and *United States Supreme Court Rule 19, §1(b), 28 U. S. C. A.* wherein it provides that a writ of certiorari may be granted where a Court of Appeals has rendered a decision in conflict with the decisions of another Court of Appeals on the same subject matter. A conflict is admitted in the opinion rendered by the Court of Appeals herein. (R. 95.) In addition, the opinion of the Court of Appeals herein is in conflict with applicable decisions of this Court on the same matter.

QUESTIONS PRESENTED

1. Whether an order by a District Court overruling and denying a motion brought prior to indictment to suppress evidence under *Rule 41(e) of the Federal Rules of Criminal Procedure, 18 U. S. C. A.*, is a final order which can be appealed.

2. Does information (a tip) from an unidentified informer, without more, given to a customs agent, who in

turn relays such information to another customs agent who makes an arrest, constitute reasonable grounds under *26 U. S. C. A., §7607* for a legal arrest where there was no warrant of arrest or search warrant?

STATUTES INVOLVED

The pertinent statutes involved are *Rule 41(e) of the Federal Rules of Criminal Procedure, 18 U. S. C. A.; 26 U. S. C. A., §7607* and *28 U. S. C. A. §1292*. The constitutional provision involved is the Fourth Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner was arrested in El Paso, Texas on July 26, 1958 by United States Customs Agent without a warrant for his arrest or a search warrant of his person. (R. 42.) The Customs Agent searched petitioner and had certain narcotics taken from his possession. On July 28, 1958 he was taken before the United States Commissioner where a complaint was filed against him. On August 18, 1958 the United States Commissioner held a preliminary examination and found that there was probable cause that petitioner had committed an offense and he was held to answer to the District Court. He was then released on bail.

Prior to indictment petitioner filed and presented his motion to suppress as evidence the narcotics found on and taken from him. The motion was filed pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure 18 U. S. C. A. Petitioner alleged that the items taken were illegally

seized and taken without either a search warrant or a warrant for his arrest. The arresting officers did not know, nor did they claim that he had a prior record or reputation for dealing in narcotics before the date of his arrest. (R. 67, 76.) They did not know of a narcotics crime or violation taking place in their presence immediately prior to the arrest of petitioner. (R. 26, 50.) A hearing was had on the motion and the District Court denied it. Petitioner excepted to the trial Court's judgment and timely filed his notice of appeal on September 4, 1958 to the United States Court of Appeals. (R. 80-81.) On December 2, 1958 the Court of Appeals entered its judgment dismissing petitioner's appeal on the ground that the order appealed from by him was an interlocutory order and therefore not appealable. Petitioner timely filed his petition for rehearing which was overruled on January 5, 1959.

REASONS FOR GRANTING WRIT

Presented are important questions which have been given conflicting decisions and opinions by the Courts of Appeal and they need to be resolved for the fair and uniform administration of justice in the Federal Criminal law.

The decision herein of the Fifth Court of Appeals that an order denying motion to suppress evidence, brought and heard prior to indictment pursuant to Rule 41 (e) of the *Federal Rules of Criminal Procedure 18 U. S. C. A.* is not a final order and therefore not appealable, conflicts with the decision of the Ninth Circuit Court of Appeals in the case of *Freeman v. United States, 160 Fed. 2d 69.* This

conflict is admitted in the opinion by the Court of Appeals in your petitioner's case. (R. 95.) Petitioner also contends that the opinion of the Fifth Circuit Court of Appeals in the case herein is also in conflict with the decision of the vast majority of the other Courts of Appeal which hold that if a motion to suppress evidence is filed and the order entered before the indictment is returned, then such order is final and independently appealable. See: *Centracchio v. Garrity, 198 Fed. 2d 382; United States Court of Appeals for the Second Circuit, In Re: Fried, 161 Fed. 2d 463; United States v. Poller, 43 Federal 2d 911; Cheng Wai v. United States, 125 Fed. 2d 915; Milburne v. United States, 77 Fed. 2d 310 (Ct. of Appeals, 3rd Cir.); In Re: Sana Laboratories, 115 Fed. 2d 717. Lapides v. U. S., 215 Fed. 2d 253.* The decision of the Court below is also in conflict with this Court's applicable decisions on the same subject matter. See *Perlman v. United States, 247 U. S. 7, 38 S. Ct. 417, 62 L. Ed. 950; Burdeau v. MacDonald, 256 U. S. 465; 41 S. Ct. 574; 64 L. Ed. 1048; Cogen v. United States, 278 U. S. 221; 49 S. Ct. 118; 73 L. Ed. 275; Go-Bart Importing v. United States, 282 U. S. 344; 51 S. Ct. 153; L. Ed. 374.*

The decision of the Court of Appeals herein to dismiss your petitioner's appeal from the trial Court's order denying his motion to suppress evidence brought prior to indictment is clearly erroneous. Not only is such decision in conflict with the majority opinions cited in the cases above, but it is also in violation of petitioner's constitutional rights under the Fourth Amendment of the United States

Constitution and the opinions of this Court's decisions in *Johnson v. United States, 33 U. S. 10; 92 L. Ed. 46; Jeffers v. United States, 72 S. Ct. 93; 343 U. S. 48; 96 Law Ed. 59; United States v. Di Re, 332 U. S. 581; 92 L. Ed. 210; McDonald v. United States, 335 U. S. 451; 93 L. Ed. 451; Giordinello v. United States, 2 Law Ed. 2d 30; 78 S. Ct. 66.*

ARGUMENT UNDER POINT ONE

The Court below erred in dismissing Petitioner's Appeal from the Trial Court's order denying his motion to suppress evidence when the motion was heard and the order entered before the indictment was returned.

The weight of authority in the cases cited above hold that if a motion is filed under Rule 41 (e) of the Federal Rules of Criminal Procedure, 18 U. S. C. A. and the order thereon is entered before the indictment is returned, then such order is final and independently appealable. The case of *United States v. Williams, 227 Fed. 2d 149* cited by the Court of Appeals in the case herein and found on P. 95 of the record herein is not applicable to the facts of this case. In that case the motion to suppress evidence was ruled on after indictment. Furthermore, another line of cases hold that even such orders ruled on after indictment are final and independently appealable. *In Re: Sana Laboratories*, supra, and *United States v. Poller*, supra.

The contention of the Court of Appeals in this case that the motion to suppress evidence which was heard and ordered denied prior to indictment is interlocutory and

therefore not appealable is not a valid holding because such an order as in effect an interlocutory order refusing an injunction, the injunctive relief being that the Government be ordered not to offer the alleged illegally obtained evidence upon trial. It would then be a type of interlocutory order then immediately appealable under *28 U. S. C. A., § 1292.* However, petitioner urge that an order denying motion to suppress evidence would be appealable whenever the motion is filed before an indictment is returned, and particularly when such motion has been ruled upon before an indictment is returned. As was said in *Cogen v. United States*, supra, "the independent character of the summary proceedings is clear, even when the motion is filed in a criminal case * * * where if the motion is filed before there is any indictment or information against the movant * * *."

ARGUMENT UNDER POINT TWO

The Courts below erred in denying Petitioner's motion to suppress the evidence seized and taken from him as a result of an illegal arrest.

The legality of the arrest of petitioner is to be determined under *26 U. S. C. A., § 7607.* Petitioner was arrested without a warrant and just prior to his arrest he was not committing a violation of law in the presence of the arresting officer. (R. 43, 50.) Further, the arresting officers did not have reasonable grounds to believe he was committing or had committed a violation of any law of the United States relating to narcotic drugs. Their only ground for making

the arrest was based upon uncorroborated information from an informer whose identity and reliability were unknown, and such ground, standing alone, does not constitute probable cause or reasonable grounds for a valid arrest without a warrant. *Ponti v. United States, 215 Fed. 2d 324; Riteson v. United States, 222 Fed. 2d 556; Worthington v. United States, 166 Fed. 2d 557.* Therefore, the incidental search and seizure of petitioner was unlawful and in violation of his rights under the Fourth Amendment of the United States Constitution and the fruits of such illegal search should have been suppressed as evidence. *Giordinello v. United States, supra; Johnson v. United States, supra; States v. Di Re, supra.*

A similar point has been raised in the case of *James A. Draper v. United States, 248 Fed. 2d 295*, petition for writ of certiorari granted by this Court on June 30, 1958 No. 136 of this Court's docket (now pending). However, in the instant case, the facts are very much weaker for the Government to constitute reasonable grounds to believe that the person arrested had committed or was committing a violation. There was no identification of the informer and he was not an agent of the Customs. (R. 48.) There was no proof of the reliability of the original source of the information, to-wit: the informer. Not only was hearsay used, but double hearsay was involved in the instant case. (R. 50-51.) We submit that such hearsay evidence, without more, does not constitute probable cause or reasonable grounds for valid arrest without a warrant. QUERY: If hearsay alone

can constitute reasonable grounds or probable cause, at what point does hearsay cease being sufficient?

CONCLUSION

For the reasons set out herein, the petition should be granted and the writ of certiorari issued, and that the judgment of the Court of Appeals for the Fifth Circuit, and the trial court be reversed.

Respectfully submitted,

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APPENDIX

Statutes Involved

18 United States Code, Rule 41 (e) of the Federal Rules of Criminal Procedure:

> "(e) Motion to Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

26 United States Code, Section 7607.

> "The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs [as defined in section 401 (i) of the Tariff Act of 1930, as amended; 19 U. S. C. Sec. 1401 (i)] may—
>
> "(1) carry firearms, execute and serve search warrants and arrest warrants, and serve sub-

poenas and summonses issued under the authority of the United States, and

"(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

28 United States Code, Section 1292.

"(a) The Courts of Appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing, or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

"(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

"(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

"(4) Judgments in civil actions for patent infringement which are final except for accounting.

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this

section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

UNITED STATES CONSTITUTION, Fourth Amendment.

"The rights of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly described the place to be searched and the persons or things to be seized."

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17440

AURELIO ZACARIAS

Appellant,

versus

UNITED STATES OF AMERICA

Appellee,

Appeal from the United States District Court for the Western District of Texas.

(December 2, 1958.)

Before TUTTLE, JONES and BROWN, Circuit Judges.

TUTTLE, Circuit Judge: This appeal from an order of the trial court denying appellant's motion to suppress evidence was prosecuted before indictment or trial of appellant. It is attacked by a motion to dismiss, filed by the United States, on the ground that the order of the trial court was interlocutory and thus not appealable.

The record before us discloses that Zacarias was searched without a warrant and had certain narcotics taken from his possession, was then arrested, taken before the United States

Commissioner, where a complaint was filed against him as provided in Rule 5, F.R.Crim.P., 18 U.S.C.A.[1] Zacarias was released on bond, employed counsel and appeared at his commitment hearing. He was bound over to the grand jury. Thereafter, at this stage of the proceedings, he filed his motion to suppress the evidence on the ground that the search

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[1] The rule makes provision for cases in which an arrest is made without a warrant as follows:

"Rule 5. Proceedings before the Commissioner.

(a) Appearance before the Commissioner.

any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer, empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

Subsequent proceedings are also prescribed by Rule 5 as follows:

"(b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

"(c) Preliminary Examination. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the Commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him."

was made without a search warrant, without an arrest warrant and without probable cause for believing that a narcotics violation was being committed or had been committed by Zacarias within the meaning of 26 U.S.C.A. §7607.[2] The trial court heard evidence on the motion to suppress, and entered an order denying it. Thereupon appellant appealed here.

The appealability of this order depends upon whether it is a "final" order of the trial court, as distinguished from an interlocutory order, since the existence of a final order is necessary in order for this court's jurisdiction to attach. 28 U.S.C.A. §1291. The answer to this question is found by determining whether this motion to suppress the evidence is an independent civil proceeding, finally terminated with the order denying the relief or is ancillary to a pending criminal proceeding.

No Supreme Court case has been cited to or been found by us that categorically answers this question. A rather full discussion of the reviewability of such orders is contained in *Carroll v. United States*, 354 U.S. 394. However, in that case an indictment had already been found which, of course, is not the case here. In *Perlman v. United States*, 247 U.S. 7, the Court held that an order denying the motion, before indict-

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[2] "The Commissioner . . . and officers of the Customs . . . may, (1) . . . (2) make arrests without warrants for violations of any law of the United States relating to narcotic drugs (as defined in Section 4731) or marihuana (as defined in Section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation." 26 U.S.C.A. §7607.

ment, to enjoin the use of certain documents that had been impounded in previous litigation, was appealable.

In *United States v. Williams*, 4 Cir., 227 F. 2d 149, the court held that an order entered after complaint and after the accused had been bound over to the District Court on a waiver of a commitment hearing, was interlocutory and not appealable. Such was the posture of affairs here, except that here the commitment hearing was held, and, as provided in the rule, Zacarias was bound over to the District Court.

We note that a different view is expressed in a decision by the Court of Appeals for the Ninth Circuit. See *Freeman v. United States*, 160 F. 2d 69. However, we think it quite plain that after a complaint has been issued by a United States commissioner, the accused has been afforded a commitment hearing at which he is permitted to cross examine the prosecuting witnesses and to testify, if he so desires, in his own behalf, and is then, in the language of the statute "[held] to answer in the district court," a motion thereafter made under Rule 41(e) is incidental to the criminal proceeding already commenced and pending. An order on such motion is not final; it is interlocutory and is not appealable.

The appeal is DISMISSED.

JUDGMENT

Extract from the Minutes of December 2, 1958

No. 17440

AURELIO ZACARIAS

versus

UNITED STATES OF AMERICA

This cause came on to be heard on the motion filed by appellee on September 25, 1958 to dismiss the appeal, and on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal in this cause be, and the same is hereby, dismissed.

ORDER DENYING REHEARING

Extract from the Minutes of January 5, 1959

No. 17140

AURELIO ZACARIAS

versus

UNITED STATES OF AMERICA

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.